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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-445

LONDON PRESS, INC., JAYBIRD ENTERPRISES, INC., PARLIAMENT NEWS, INC., SEVEN TOWERS, INC. dba ACADEMY PRESS, AMERICAN ART ENTERPRISES, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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The petitioners London Press, Inc., Jaybird Enterprises, Inc., Parliament News, Inc., Seven Towers, Inc., dba Academy Press, and American Art Enterprises, Inc., respectfully pray that a writ of certiorari issue to review the opinion and judgments of the United States Court of Appeals for the Ninth Circuit.

Opinion Below.

The opinion of the Court of Appeals was entered on August 2, 1976, and appears as Appendix A. The Court of Appeals directed that its per curiam opinion not be published.

Jurisdiction.

The judgments of the Court of Appeals were entered on August 2, 1976. Petitioners duly filed a petition for rehearing, which petition was denied on August 30, 1976. A copy of the order denying said petition appears as Appendix B. Thereafter, petitioners filed a motion for stay of issuance of mandate pending petition for writ of certiorari to the United States Supreme Court, which petition was granted on September 13, 1976, provided a petition for writ of certiorari is filed in the clerk's office of this Court on or before September 29, 1976. A copy of the order staying issuance of the mandate is attached as Appendix C.

Questions Presented.

These corporate petitioners were charged with conspiracy, and aiding and abetting, violations of the federal obscenity statute. It was stipulated that these petitioners knew only the "contents" of the material. The case was tried by a single judge, sitting without a jury. The government specified in its bill of particulars that the material violated only national standards, and insisted throughout the trial that the court focus solely on the issue of national standards. The only evidence offered by the government and petitioners was on national standards. The trial judge stated continually throughout the trial, and upon rendering judgment, that he was deciding only on the basis of national standards; that he was not relying on his own knowledge or his own predilections. On appeal, petitioners became entitled to the benefits of *Miller*. It is probable that the local standards were and are more liberal and less strict than those of the nation as a whole. The

Court of Appeals below, in affirming the judgments of conviction, conceded that error had been committed, but nevertheless affirmed, the panel feeling itself bound by an en banc ruling of the circuit in another case tried before a jury, and distinguishable on the law and the facts. The questions presented are, therefore:

1. Whether the judgments of conviction based solely upon national standards, deprive petitioners of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

2. Whether the judgments of conviction deprived petitioners of freedom of speech and press and due process of law, contrary to the provisions of the First, Fifth and Sixth Amendments to the Constitution, where, as here, the government filed a bill of particulars advising petitioners that the sole charge was that the indicted material offended national standards, precluding petitioners from demonstrating that local standards were more liberal and less strict than the national standards, and that the indicted material did not offend local standards.

3. Whether the judgments of conviction under an indictment charging conspiracy and aiding and abetting, resting solely on a stipulation that petitioners knew the "contents" of the material, and without any further proof of knowledge of the nature and character of the material or guilty knowledge in any other respect, deprive petitioners of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth and Sixth Amendments to the Constitution and Title 18, United States Code §§2, 371 and 1461, appear as Appendix D hereto.

Statement.

The petitioners London Press, Inc., Jaybird Enterprises, Inc., Parliament News, Inc., Seven Towers, Inc., dba Academy Press, and American Art Enterprises, Inc., appeal from judgments of conviction rendered after trial before the Honorable E. Avery Crary, a Judge of the United States District Court for the Central District of California, sitting without a jury, under indictment charging violations of 18 U.S.C. §§2, 371 and 1461.

The indictment was returned in the United States District Court for the Central District of California on August 16, 1971, and contained thirty-one counts. The indictment named the corporate petitioners herein and certain individual defendants who are not involved in this appeal for reasons which appear hereafter.

A. Prior to trial, petitioners filed a motion for a bill of particulars, asking the government:

> (1) To state whether it is claimed that the publications referred to in the indictment "substantially exceed contemporary community standards in the *nation as a whole* in the description or representation of sex and nudity" (Emphasis added).
>
> (2) To state whether it is claimed that the publications referred to in the indictment "appeal to the prurient interest of the average person in the *nation as a whole*" (Emphasis added).

Pursuant to court order, the government filed a bill of particulars, stating, inter alia:

> (1) "It is claimed that the appeal of one or more of the materials referred to in each count of the indictment . . . goes substantially beyond current community standards or acceptable *limits of candor of the nation as a whole* in the description or representation of sex or nudity." (Emphasis added).
>
> (2) "The appeal referred to . . . considered in relation to the intended and probable recipients, is to the prurient interest of the average person *in the nation as a whole*." (Emphasis added).

Prior to trial, counsel for the government and counsel for the petitioners herein and the individual defendants named in the indictment entered into a stipulation,[1] with the approval of the court, entitled "Stipulation re Motion for Severance", providing in essence that a severance be granted with respect to the corporate petitioners herein and that petitioners' case be tried first to the court, without a jury. It was stipulated that petitioners had agreed to mail the material referred to in the various counts of the indictment and that the petitioners had knowledge of the contents of the material. A document attached to the stipulation was entitled "Statements of Witnesses", and it was agreed therein that the addressees and other persons who received the material would be deemed to have been called and sworn and to have testified at the trial that they received the material named in the indictment by mail.

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[1]One individual defendant, Robert Reitman, was represented by separate counsel and did not enter into the stipulation.

In accordance with the stipulation, the trial of the petitioners commenced on June 20, 1972, before the Honorable E. Avery Crary, sitting without a jury.

B. As heretofore noted, the indictment contains thirty-one counts. Count 5 did not involve the corporate petitioners, and Counts 11 and 12 were dismissed on the government's motion. The court concluded that some of the materials charged in the indictment were obscene and some not obscene. The court found petitioners not guilty on Counts Two, Three and Four and guilty on the other counts submitted to it.[2]

C. At trial, the government offered the witness Father Morton A. Hill as its sole expert with respect to the issue of "national contemporary community standards in depicting sex or nudity". Father Hill's testimony related solely to whether the materials at issue "substantially exceed the national community standards in depicting sex or nudity" (Reporter's Transcript, hereinafter R.T., 23). Each time government counsel asked the witness his opinion concerning the materials at bar, the question was asked in terms of national standards [R.T. 23, 28, 34, 36, 37, 40, 41, 42, 43, 45, 46, 47]. Petitioners' expert witnesses similarly limited their testimony to the question of whether the material went substantially beyond national standards in depicting or representing sexual matters [R.T. 625, 981, 1171, 1172].

On two separate occasions, the trial judge asked the government if there was any question as to whether the national standard was the governing standard for the case. Government counsel stated that he was trying

[2]Many of the counts dealt with identical materials. In all, seven items were found obscene.

the case on a national standard theory. The court stated that it was its understanding that the material was to be measured by national standards and if there was any controversy on that, the court would "like to know" [R.T. 42-43]. After government counsel stated that the government was not suggesting the application of a local standard, the court stated: "All right. Then we're applying the national standards." Government counsel agreed, saying, "Yes" [R.T. 43].

During argument on petitioners' motion for a judgment of acquittal at the close of the government's case, the following colloquy took place between the court and government counsel, Mr. Edwards, concerning the application of national standards:

> "THE COURT: It is your position that the national standard only applies to the first element? You don't have to be concerned about a national standard as to any element other than the first? Or do you agree it has to be—does the national standard apply to the prurient appeal?
>
> "MR. EDWARDS: Well, the predominant theme has to appeal to an average person who is average by the national standards. That is, it has to go beyond the limits of candor in the view of the average person.
>
> "THE COURT: Which is the national standard?
>
> "MR. EDWARDS: The limits of candor are taken as the national standard." [R.T. 384].

D. The corporate petitioners were all charged with conspiracy to mail obscene material in violation of 18 U.S.C. §1461, and petitioner London Press, Inc., a printer, was also charged as an aider and abettor

in the substantive counts of the indictment. All of the evidence having to do with the conspiracy and all of the evidence except that dealing with the question of obscenity was introduced by way of stipulation [Govt. Exh. 32]. It was stipulated "that during the period from February 21, 1968 to the date of the indictment herein [petitioners] within the Central District of California did agree with one another to mail and did cause to be mailed the advertisements, books and magazines referred to in Counts 2 to 10 and 13 to 31 of the indictment, that said advertisements, books and magazines were mailed to the addresses indicated in said counts and that said corporate [petitioners] had knowledge of the contents of said advertisments, books and magazines when they agreed to mail them and when they caused them to be mailed". It was further stipulated that the addressees and other persons received said advertisements, books and magazines. Attached to the stipulation was a document entitled "Statements of Witnesses", wherein it was stipulated that the said witnesses be deemed to have been called, sworn and testified in accordance with the said statements [Govt. Exh. 32; R.T. 148-151]. Paragraph 1 of the statement provides as follows:

> "Ruth Lucas resided at 370 North Clark Avenue, Los Altos, California on or about May 20, 1970 when she received Government's Exhibits 2 through 2-D in the mail, Exhibit 2 being an envelope containing Exhibits 2-A through 2-D. She had not solicited these exhibits."

Except for the name and address of the addressee, the date, and the exhibit number, Paragraphs 2 and 5 through 27 of the said statements of witnesses were

identical to Paragraph 1. Paragraph 3 of the statement provided that Donald Schoof was a United States Postal Inspector in Los Angeles when he received the government's Exhibits 4 through 4-C from Harold V. Branton, Assistant Postmaster, Hutchinson, Kansas. Inspector Schoof had previously solicited and paid for Exhibits 4-A through 4-C, using a fictitious name. Paragraph 4 of the statement provided that Harold V. Branton was Assistant Postmaster, Hutchinson, Kansas, on or about July 23, 1970, when he received the government's Exhibits 4 through 4-C in the mail, Exhibit 4 being an envelope containing Exhibits 4-A through 4-C. He recognized the addressee as being a fictitious name used by Postal Inspector Donald Schoof and he delivered the exhibits to Inspector Schoof. Paragraph 28 of the statement provided that Wayne Elliott was Superintendent, Indian School Station Post Office, Phoenix, Arizona, on or about April 19, 1971, when he received the government's Exhibit 30 in the mail and on or about June 25, 1971, when he received the government's Exhibit 31 in the mail. On both occasions, he recognized the addressee as being a fictitious one used by Postal Inspector Paul Alfred and he forwarded the exhibits, without opening them, to Inspector Alfred in Los Angeles. Paragraph 29 of the statement provided that Paul Alfred was a United States Postal Inspector on or about April 19, 1971, when he received the government's Exhibit 30 in the mail, opened it and found it contained government's Exhibit 30-A, and on or about June 25, 1971, when he received government's Exhibit 31 in the mail and opened it and found that it contained government's Exhibit 31-A. Inspector Alfred had, by mail, previously ordered and paid for both Exhibits 30-A and 31-A, using a fictitious name.

E. On February 24, 1972, the court rendered an oral opinion [R.T. 1502]. As previously noted, the court concluded that some of the material involved in the proceedings was obscene and that some of the material was not obscene. The trial judge made it plain in his oral opinion that he was judging the material by national standards. After observing that petitioners' experts testified as to the national survey and the studies that were made by the Commission on Obscenity and Pornography, the court stated:

> "It was the opinion of these experts, and also other witnesses that testified on behalf of the defendants, that based on the results of the [national] survey and the studies of the Commission and other experience and work of these experts that none of the material mailed by the defendants was obscene. . . ." [R.T. 1503].

The court next observed that the "national survey was criticized by a witness for the government, Father Hill, who was also a member of the Commission" [R.T. 1504]. The court then noted that the recommendation of the Commission was rejected by the President and Congress. "It's common knowledge that Congress is a recognized weathervane as to public opinion." Congress' failure to approve the report of the Commission was some indication to the trial court concerning "the community standards from a national standpoint" [R.T. 1508].

The trial judge made it clear that he was basing his opinion on the law and the evidence in the case as he understood it, and not on his personal views concerning the material. "No one knows better than I that my personal views have nothing to do with it

at all. I fully appreciate that and I want that to be sure to be in the comments that are written up." [R.T. 1529]. The court expressed the same view earlier, stating: "Of course, the court has to be careful that he doesn't get involved in his own views, because his views are not material in any sense of the word . . ." [R.T. 1447].

On the issue of *scienter*, the court concluded that "knowledge of contents" was sufficient [R.T. 1524]. Throughout the trial, petitioners contended that knowledge of contents of the material, without more, was constitutionally insufficient. Petitioners so argued in their original motion to dismiss the indictment and in their motion for a judgment of acquittal at the close of the government's case [R.T. 372]. In connection with the motion for a judgment of acquittal, the following colloquy took place between the court and counsel for petitioners:

> "MR. FLEISHMAN: . . . All I'm really saying . . . is that it has to be more than merely knowledge of contents. It may be that the Government is required to prove that the defendants knew the material, in fact, went substantially beyond customary limits of candor and appealed to prurient interest and was utterly without redeeming social value.
>
> "THE COURT: In other words, you're saying that the individual has to be fully apprised of what the national standard is and, therefore, must know it's substantially beyond, is that what you are saying?
>
> "MR. FLEISHMAN: Yes, your Honor. That is a heavy burden . . ."

"THE COURT: Yes, it's a heavy burden and it's something that—I don't know who knows what the national standard is. You can get just as many views almost as you can get witnesses. You both can get witnesses, of course, as to what is the national standard.

"MR. FLEISHMAN: That's part of the problem, your Honor.

"THE COURT: Of course, it is. You expect every book seller to know what the national standard is by virtue of what you say it is by your witnesses and what the Government says it is by theirs you'd have an imponderable.

"But to say that every bookstore owner must know what the national standard is and then he must know that what he has for sale is substantially—that it substantially violates that national standard." [R.T. 374-375].

F. Following the rendition of the verdicts of guilty on the counts heretofore specified, petitioners filed a motion in arrest of judgment, a motion for a new trial, and a motion for judgment of acquittal, all of which were denied [R.T. 1538-1576]. The petitioner London Press, Inc., having been found guilty on the conspiracy count and of aiding and abetting in the substantive counts of the indictment, where guilty verdicts were returned, was sentenced to pay fines totaling $33,000. The remaining petitioners, having been found guilty on the conspiracy count, were each sentenced to pay a fine of $10,000. The total fines assessed against petitioners was $73,000. Pending appeal, the trial court stayed payment of the fines.

G. On September 26, 1972, each of the petitioners filed a notice of appeal [Clerk's Transcript, hereinafter C.T., 457-571]. The parties duly filed their appellate briefs in the Court of Appeals prior to this Court's decision in *Miller v. California*, 413 U.S. 15. On August 9, 1973, the Court of Appeals ordered the parties to file a supplemental brief, addressing themselves to the impact of this Court's decisions in *Miller v. California* and the other four obscenity cases decided by this Court on June 21, 1973. Subsequent to the filing of said supplemental briefs and on October 31, 1973, the Court of Appeals, sitting en banc, made an order *sua sponte*, withdrawing the appeal from the panel to which it was assigned and taking the appeal en banc. Prior to the en banc hearing, and after this Court decided *United States v. Hamling*, 418 U.S. 87, the Court of Appeals retransferred the case to the original panel to which it was assigned for decision. On August 19, 1974, the parties were ordered to file a supplemental brief discussing the impact of *Hamling* on the case at bar. After said briefs were filed, and on November 24, 1974, submission of the case was vacated pending the en banc decision in *United States v. Cutting and Still*, Ninth Circuit No. 71-2570. *Cutting* was decided on June 16, 1976 and the case at bar was decided on August 2, 1976, the court relying completely on *Cutting*. The court below stated, *inter alia:*

"Prior to our court's decision in *United States v. Cutting*, . . . appellants' attack on the national standards issue had strength. *Cutting* so far debilitates the attack as to reduce the mistake to harmless error."

REASONS FOR GRANTING THE WRIT.

1. *Hamling v. United States,* 418 U.S. 87, 102, held that "any consitutional principles enunciated in *Miller* which would serve to benefit the petitioners must be applied in this case". The government, in its brief to this Court in *Hamling,* argued that the *only* benefit *Miller* gave to a person in petitioners' status flowed from the Court's shift from a national to a local standard test. "Petitioners could have benefited from the application of a local standard only on the unlikely hypothesis that the jurors would have found their own community more permissive than the nation as a whole". (Govt. Br. 30).

Petitioners cannot fairly, or constitutionally, be subjected to penalties unless it can be said, beyond a reasonable doubt, that the community standards of the Central District of California are not "more permissive than the nation as a whole". From the beginning, it has been recognized that a work may not be condemned as obscene if it does not go substantially beyond contemporary community standards. *Roth v. United States,* 354 U.S. 476; *Smith v. California,* 361 U.S. 147; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478. In *Manual,* Justice Harlan, speaking for the Court, stated that an element which is essential to a valid determination of obscenity is whether the publications can be deemed so offensive "as to affront current community standards". Obscenity connotes, Justice Harlan stated, "something that is portrayed in a manner so offensive as to make it unacceptable under current community mores" (370 U.S. at 482). Justice Harlan observed that one of the essential elements of obscenity is that the material go "substantially beyond customary limits of candor in description or representation of matters pertaining to sex and nudity" (370 U.S. at

486). In finding the publications there involved not obscene, Justice Harlan stated that the portrayals could not "fairly be regarded as more objectionable than many portrayals . . . that society tolerates" (370 U.S. at 490).

Justice Harlan expressed similar views in his concurring opinion in *Smith v. California,* 361 U.S. 147. He there stated:

> "I agree with my brother FRANKFURTER that the trier of an obscenity case must take into account 'contemporary community standards,' Roth v. United States, 354 U.S. 476, 489. This means that, regardless of the elements of the offense under state law, the Fourteenth Amendment does not permit a conviction . . . unless the work complained of is found substantially to exceed the limits of candor set by contemporary community standards. The community cannot, where liberty of speech and press are at stake, condemn that which it generally tolerates." (361 U.S. at 171).

Miller did not change the law in this respect except that *Miller* required that the trier of fact apply local community standards rather than hypothetical and unascertainable national standards. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct tolerable in Las Vegas or New York City . . . People in different states vary in their tastes and attitudes. . . ." *Miller,* 413 U.S. at 32-33. *Miller* also noted that in *Jacobellis v. Ohio,* 378 U.S. 184, two Justices argued that application of "local" community standards would run the risk of preventing dissemination of materials in some places because sellers would be unwilling

to risk criminal conviction by testing variations in standards from place to place. Responding to this argument, Chief Justice Burger stated:

> "The use of 'national' standards however necessarily implies that the materials found tolerable in some places but not under the 'national' criteria will nevertheless be unavailable where they are acceptable." *Miller v. California,* 413 U.S. at 33.

Miller expressly emphasized that community standards differ from the national standard and that local communities differ from one another.

A. This record is not like that in *Hamling.* In *Hamling,* the Court assumed that the jury was probably not influenced by the "occasional references" to national standards in the trial court's instructions and concluded that the jury correctly applied the standards of the average person in the community or vicinage from which it was drawn (418 U.S. at 108). Stressing the importance of a jury trial in obscenity cases, the Court stated that a juror "is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination. . . ." (418 U.S. at 104). A jury was presumed to know community standards even "without the benefit of expert evidence" (418 U.S. at 105).

The case at bar was tried to a judge, sitting without a jury. The trial judge specifically refused to draw on his own knowledge of the views of the average person in the community for making the required determination. He implicitly stated that he did *not* know the limits of sexual candor and relied exclusively on the testimony of the experts in making his determination [R.T. 1447, 1529]. The trial judge understood that

a federal judge with life tenure, unlike a jury, does not represent the community. Without the benefit of expert evidence, he does not have the ability to ascertain the sense of the "average person, applying contemporary community standards". The trial judge recognized that if it can be said that a jury represents the "average person", it can be said equally that an appointed federal judge is not "average" and does not represent the "average person".

Miller emphasized the special role a jury plays in an obscenity trial. Even before *Miller,* Judge Hand stated in *United States v. Levine,* 84 F.2d 156, 157 (2 Cir. 1936), that obscenity "is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a small bit of legislation ad hoc. . . ." In *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 447, Justice Brennan stated that a jury trial provides a peculiarly competent application of the standards for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. The jury, he said, "represents a cross section of the community and has a special aptitude for reflecting the view of the average person". In *Times Film Corp. v. Chicago,* 365 U.S. 43, 68-69, Chief Justice Warren, dissenting, said of the censorship there involved: "The inexistence of a jury to determine contemporary standards is a vital flaw."

As previously observed, the trial judge twice asked the government whether he was to apply national standards, and twice the government assured him that he was to apply national, and not local, standards. This is not a case like *Hamling,* therefore, where "occasional references" in the trial court's instructions to the "coun-

try as a whole" can be disregarded as "harmless error". Aside from the fact that the trial judge was in no position to "judicially notice" community standards concerning sex, he never undertook to determine whether the publications offended local community standards. He was concerned solely with national standards and, relying on the government expert, found only that the publications offended those national standards.

One week after the court below decided the case at bar, a different panel of the Ninth Circuit decided another obscenity case, demonstrating the probability that petitioners herein were harmed by not having their material measured by the correct local standards rather than the incorrect national standards. *United States v. Obscene Magazines, Films and Cards,* (No. 75-1279 [*United States v. Thirty-Seven Photographs,* No. 75-1290], August 9, 1976, ... F.2d ....[3]). In those consolidated cases, a divided court affirmed the denial of forfeiture, on the ground of obscenity, in proceedings which were tried to the court without a jury. At trial, the government introduced the allegedly obscene pictures and rested, without putting on expert witnesses. Defendant also rested without putting on any evidence. The district judge, focusing on the test of obscenity dealing with contemporary community standards, stated that about a year and a half before, a jury sitting in his court found not obscene a motion picture film

[3]On August 30, 1976, an order was filed in the Court of Appeals for the Ninth Circuit, extending the government's time to file a petition for rehearing or a petition for rehearing with a suggestion for rehearing en banc to and including September 22, 1976. By letter dated September 17, 1976, the government advised the Clerk of the Court of Appeals for the Ninth Circuit that the Solicitor General has determined not to authorize further review of these cases and that the government accordingly will not file a petition for rehearing.

depicting vivid and patent sexual relations, vaginal and oral, between a male and a female. The district court concluded that "hard-core" material did not necessarily go beyond customary limits of candor in the Los Angeles area. The government appealed contending that the district court abdicated its duty in failing to find the material obscene. In affirming the district court, the majority of the Court of Appeals described the pictures as follows:

> "[A]ll depict human bodies, or parts thereof, in various postures of reproductive or erotic behavior. Some, if not all, of the exhibits probably would be patently offensive to large numbers of involuntary viewers. Many of the exhibits, however, might not offend other viewers."

The court noted that while the material met the "specificity" requirement of *Miller* "[t]he District Court was not persuaded that any of the exhibits were so patently offensive, when measured by the community standards of the Los Angeles area, as to warrant declaring them contraband and forfeit to the Government." (Slip Opinion 2). The majority noted that the district court "was not persuaded that the exhibits in question were any worse than the photographs found in magazines for sale in various sections of the city and its surrounding communities." The majority stated that the district court could have found the exhibits obscene under the "patently offensive" test of *Miller,* but did not do so. "Had there been a jury, it could, perhaps, supply its own views of community standards. The judge, a resident of the general area, felt unable to assert with any confidence that, by the standards of the Los Angeles area, the exhibits were sufficiently offensive to require him to declare them contraband.

. . . The cases do not hold that a trier of fact must, as a matter of law, respond at a level of outrage equal to the minimum level that will pass First Amendment muster under *Miller*." (Slip Opinion 2-3).

If, in the case at bar, the government had not convinced the trial judge that the case was to be decided only on national standards and upon the evidence of national standards which the government produced, the trial judge might have reached a conclusion similar to the conclusion reached by the trial judge in *United States v. Obscene Magazines, Film and Cards* [*United States v. Thirty-Seven Photographs*], *supra.*

It is thus plain the petitioners were materially prejudiced by the trial court's reliance on the erroneous national standards, rather than the correct local standards. If all of this does not rise to constitutional error, clearly the judgments of conviction cannot be said to have been fairly obtained or consistent with "civilized standards of procedure" which underlie the express constitutional prohibitions against arbitrary deprivation of property without due process of law.

B. If the case herein had been tried under the correct local standards test, petitioners would have demonstrated that the standards of the Central District of California are more tolerant in matters pertaining to sex than are the standards in the nation as a whole. The City Attorney of Los Angeles, Burt Pines, has admitted as much in an article he wrote entitled "The Obscenity Quagmire" appearing in the California State Bar Journal (November-December 1974, Vol. 46, No. 6, p. 509). Unlike *Hamling*, the trial judge made it plain that he thought there was a difference between national and local standards, and that he found

only that the government's witness on national standards, Father Hill, was more credible than petitioner's witnesses testifying concerning national standards. The trial judge was informed by the prosecution that its reliance was solely upon "national standards". The case was tried solely upon that theory; the evidence given by the government and by the witnesses for the defense was directed toward that end; and the court found only a violation of national standards. It cannot be assumed that the trial judge disregarded the evidence and the then governing constitutional principles enunciated by this Court and, of his own volition, decided the case on the basis of a "knowledge of the views of the average person in the community or vicinage from which he comes." A judge sitting without a jury is thought to be better able than a jury to follow the law and to base a judgment upon the evidence presented in a case, excluding every consideration except that which the law requires. Since the trial judge explicitly stated that he would not rely upon his own feelings in the matter, it is probable that he had known that local standards, rather than national standards, were to be applied, he would have required the government to put on evidence concerning local standards, rather than pass a judgment relying on his intuition. Neither the district court nor the Court of Appeals gave petitioners the benefit of the *Miller* local standards test. To the extent that the standards of the Central District of California are more tolerant than the standards of the nation as a whole, *Miller* tightened the constitutional rules that previously had prevailed. As applied to this case *Miller* altered the prevailing standards of obscenity by prohibiting material to be found obscene that could have been

found obscene under the *Memoirs* national standards test. Petitioners were entitled to this benefit afforded by *Miller,* but did not receive it.

C. As noted above, the court below stated that prior to the en banc hearing in *Cutting,* petitioners' "attack on the national standards issues had strength. *Cutting* so far deliberates the attack as to reduce the mistake to harmless error." *Cutting,* it is respectfully submitted, goes beyond *Hamiling,* and is distinguishable from the case at bar. Judge Hufstedler (with whom Circuit Judges Koelsch, Ely, and Choy concur) dissented in *Cutting.* The dissenters noted that in *Hamling* there was evidence that the local and national standards were similar. The dissenters recognized that the material before them "would surely offend some communities" but found no warrant for assuming that: (1) The jurors disobeyed the instructions concerning national standards and applied a hypothetical average person in some "community" other than the nation, or (2) the jurors obeyed the instructions, but concluded that whatever the national standard was, it was no different from the standard of their own vicinage, or, if there were any differences, the local standard was stricter. The dissenters believed that "in the absence of any evidence in the record about levels of tolerance, the appropriate assumption is that 'local' attitudes and national standards, in fact, differ. The Supreme Court in *Miller* expressly emphasized the existence and importance of such differences in rejecting a national standard (413 U.S. at 30, 32-33)." The dissenters assumed that local and national standards differ and could find no justification in logic or common experience for deciding that the difference is that a non-national standard is always stricter than the former national standard.

Without such justification, the dissenters stated, Appellant Cutting was deprived of all opportunity to be heard on the standards issue. Rudimentary concepts of due process forbid that result. (*Cf. Bouie v. City of Columbia,* 378 U.S. 347, 352; *United States v. Jacobs,* 513 F.2d 564, 566 (9 Cir. 1975)). The dissenters would have remanded the case for an evidentiary hearing to determine whether appellant Cutting would have benefited from retrospective application of *Miller* and whether the instruction upon national standards probably affected the jury.

In *Cutting* the court sought to distinguish *United States v. Henson,* 513 F.2d 156, (9 Cir. 1975), where the court found a national standards instruction prejudicial to the defendants. The majority stated a new trial was ordered in *Henson* because the government may have succeeded in its attempt to convince the jury that the national standard was more strict than the local standard. The majority noted that *Henson* stated that the "prosecutorial attempt to separate and differentiate a 'national standard' from the defense testimony concerning the attitudes of California" distinguished *Henson* from *Hamling. . . .*" (Slip Opinion 9). It is respectfully submitted that the case at bar is more analogous to the decision in *Henson* which the majority in *Cutting* distinguished than the *Cutting* ruling itself, upon which the court below in the case at bar placed complete reliance. It is apparent that in the Ninth Circuit, as in other circuits, there is considerable confusion as to the proper application of the community standards test. This petition should be granted and the case considered together with *Marks v. United States,* No. 75-708, and *Smith v. United States,* No. 75-1439.

2. Petitioners were denied a fair trial and due process of law because they were not notified of the nature of the charge against them. Indeed, the government furnished petitioners with a bill of particulars which wholly misled petitioners as to the nature of the charge against them.

The statute here at issue, 18 U.S.C. §1461, does not provide a definition of "obscenity" and contains no expression of the controlling community standards. The indictment was in statutory language only. The government, in its bill of particulars, claimed that the appeal of the material at bar "goes substantially beyond current community standards or acceptable limits of candor of the nation as a whole in the description or representation of sex or nudity". *Miller* and *Hamling* teach us that the reference to the national standards was constitutionally and statutorily erroneous. In summarizing the *Miller* holding, the Court stated: "[O]bscenity is to be determined by applying 'contemporary community standards,'. See, *Kois v. Wisconsin* [408 U.S. 229 (1972) (per curiam)] *supra*, at 230, and *Roth v. United States* [354 U.S. 476 (1957)] *supra*, at 489, not 'national standards'" (413 U.S. at 37). *Hamling* states: The result of the Miller cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." (418 U.S. at 105).

The court below held that the reference to national standards in the bill of particulars did not render the indictment invalid, saying:

> "The indictment stated an offense under pre-Miller law. (E.g., Memoirs v. Massachusetts (1966) 383 U.S. 413; Roth v. United States (1957) 354 U.S. 476; Cf. Manual Enterprises, Inc. v. Day (1962) 370 U.S. 478, 488). The indictment did not describe the 'community' standard in geographic terms. Thus, the face of the indictment did not offend the Miller-Hamling rule. A bill of particulars is not an amendment to or a subtraction from the indictment. (Pitkin v. United States (5th circuit 1957) 243 F.2d 491, 494.) The indictment is valid."

Petitioners do not here contend that the indictment is invalid. Rather, they contend that they were denied due process of law, and a fair trial, by being advised by the government, in the bill of particulars, to defend under erroneous and unconstitutional standards and were precluded from defending under the correct, and constitutional, "community" standard. It is clear that petitioners' convictions were sustained below on an assumption that the materials at bar went substantially beyond contemporary standards of the Central District of California in depiction or representation of matters pertaining to sex or nudity. It is equally clear that petitioners were not charged with violating that standard, nor were they tried and convicted of violating that standard. This Court has repeatedly held that treating a conviction as a conviction upon a charge not made is a denial of due process of law. *DeJonge v. Oregon*, 299 U.S. 353; *Cole v. Arkansas*, 333 U.S. 196; *Rabe v. Washington*, 405 U.S. 313; *Eaton v. Tulsa*, 415 U.S. 697.

Additionally, the function of a bill of particulars is to provide a defendant with information about the details of the charge against him so that he may prepare his defense and avoid prejudicial surprise at the trial. The issue on a motion for a bill of particulars is what the government intends to prove. In the case at bar, the bill of particulars framed the issues and precluded petitioners from introducing evidence which might have persuaded the trial judge that the material at bar did not offend contemporary "community" standards. As Justice Brennan stated, dissenting in *Hamling*:

> "To affirm their convictions without affording them opportunity to try the case on the 'local' standards basis is a clear denial of due process." 418 U.S. at 150; see, *Saunders v. Shaw*, 244 U.S. 317.

3. The record is barren of evidence to support a finding that petitioners violated 18 U.S.C. §371 by conspiring to violate 18 U.S.C. §1461. Similarly, the record is barren of any evidence to support a finding that petitioner London Press, Inc. violated 18 U.S.C. §2 by aiding and abetting a violating of 18 U.S.C. §1461.

As previously noted, all the evidence having to do with the conspiracy, and aiding and abetting except that dealing with the question of obscenity was introduced by way of stipulation. The stipulation provided that petitioners did agree with one another to mail and did cause to be mailed the material charged with being obscene and that they had *knowledge of the contents* of said material when they agreed to mail the material and when they caused the material to be mailed. The stipulation did not meet the requirements

of *Hamling*, which held that §1461 requires that the defendant have knowledge of the contents *and* that he know the character and nature of the materials.

> "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, *and that he knew the character and nature of the materials.*" (418 U.S. at 123. Emphasis added).

Knowledge of the character and nature of the materials on the part of these petitioners was never proven. The government, and the courts below, were of the view that §1461 was within that category of offenses that dispense with *mens rea* requirements. Petitioners submit that the obscenity statute, touching as it does First Amendment rights, requires that the government prove guilty knowledg before a conviction may validly be obtained. Since there was no proof of guilty knowledge herein, there is a total absence of proof of guilt. Conviction without proof of guilt is, of course, a denial of due process. *Thompson v. Louisville*, 362 U.S. 199.

Moreover, the only charge against the petitioners is that they conspired to violate 18 U.S.C. §1461 and that petitioner London Press, Inc., aided and abetted a violation of §1461. Such charges carry additional *scienter* requirements. The gist of the offense of conspiracy is a combination or agreement, with guilty knowledge, to disobey or to disregard the law. *Krulevitch v. United States*, 336 U.S. 440, 445, 446, Fn. 2; *Grunewald v. United States*, 353 U.S. 391, 404; *United States v. Falcone*, 311 U.S. 205.

In *United States v. Feola*, 420 U.S. 671, the Court, with apparent approval, referred to the "Powell Doctrine" to the effect that a conspiracy to be criminal,

must be animated by a corrupt motive or a motive to do wrong.

Just as a conspiracy requires a criminal intent, to find one guilty as an aider and abetter it must be proved that the person shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed. By far the most important element is the sharing of the criminal intent of the principal. The crime of aiding and abetting is one that requires a "specific intent". There must be a culpable purpose before an act can be equated with aiding and abetting. See, *Hernandez v. United States,* 300 F.2d 114, 123-124 (9 Cir. 1962); *Snyder v. United States,* 448 F.2d 716, 718-719 (8 Cir. 1971); *United States v. Peoni,* 100 F.2d 401, 402 (2 Cir. 1938); *United States v. Kelton,* 446 F.2d 669 (8 Cir. 1971); *United States v. Rodgers,* 419 F.2d 1315 (10 Cir. 1970); *United States v. Barber,* 429 F.2d 1394 (3 Cir. 1970).

If, as in the case at bar, a judge sitting in an obscenity prosecution as a trier of fact may find a person guilty of conspiring to violate §1461 and aiding and abetting a violation of that section, merely from proof that an accused knew the "contents" of the materials, then the trier of the facts is left free to presume guilt by his own subjective predilections, on the basis of arbitrary inferences and presumptions which undermine all procedural safeguards required in prosecutions involving speech and press. See, *Smith v. California,* 361 U.S. 147; *New York Times Co. v. Sullivan,* 376 U.S. 254; *Speiser v. Randall,* 357 U.S. 513.

Conclusion.

For the foregoing reasons a writ of certiorari should issue to review the judgments and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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By STANLEY FLEISHMAN,
Attorneys for Petitioners.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Memorandum Opinion of the Court of Appeals.

United States Court of Appeals, for the Ninth Circuit.

United States of America, *Plaintiff-Appellee,* vs. London Press, Inc., Jaybird Enterprises, Inc., Parliament News, Inc., Seven Towers, Inc., dba Academy Press, American Art Enterprises, Inc., *Defendants-Appellants.* Nos. 72-2938, 72-2939, 72-2940, 72-2941, 72-2942.

MEMORANDUM

[August 2, 1976]

Appeal from the United States District Court
for the Central District of California

Before: BROWNING and HUFSTEDLER, Circuit Judges, and SOLOMON,* District Judge.

Defendants appeal from their convictions for violating 18 U.S.C. §§2, 371, and 1461 (mailing obscene matter[1]) following trial by the court, sitting without a jury. The convictions antedated the decision of *Miller v. California* (1973) 413 U.S. 15 and its companion obscenity cases. Numerous issues have been raised in the multiple briefs filed by the parties in response to changes in obscenity law that have occurred during the pendency of the appeal. Almost all of the original issues have vanished in the wake of *Miller v. California, supra, United States v. 12 200-Ft Reels* (1973) 413 U.S. 123, and *Hamling v. United States* (1974) 418 U.S. 87.

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*Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

[1]The materials found obscene were advertising brochures and magazines containing pictures similar to those described in Hamling v. United States (1974) 418 U.S. 87, 92-93.

The two remaining issues are posed by the *Hamling* rule that obscenity in a Section 1461 prosecution is not to be determined by a national standard: (1) Did the statement of a national standard as "the current community standard" invalidate the indictment? (2) Was the application of the national standard at trial prejudicial error?

The indictment stated an offense under pre-*Miller* law. (*E.g., Memoirs v. Massachusetts* (1966) 383 U.S. 413; *Roth v. United States* (1957) 354 U.S. 476; *cf. Manual Enterprises, Inc. v. Day* (1962) 370 U.S. 478, 488.) The indictment did not describe the "community" standard in geographic terms. Thus, the face of the indictment did not offend the *Miller-Hamling* rule. A bill of particulars is not an amendment to or a subtraction from the indictment. (*Pipkin v. United States* (5th Cir. 1957) 243 F.2d 491, 494.) The indictment is valid.

Prior to our court's decision in *United States v. Cutting* (9th Cir. *en banc* 1976) .... F.2d .... [No. 71-2570, Slip Op'n June 16, 1976], appellants' attack on the national standards issue had strength. *Cutting* so far debilitates the attack as to reduce the mistake to harmless error.

Affirmed.

APPENDIX B.

Order Denying Petition for Rehearing.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. London Press, Inc., Jaybird Enterprises, Inc., Parliament News, Inc., Seven Towers, Inc., dba Academy Press, American Art Enterprises, Inc., Defendants-Appellants. Nos. 72-2938, 72-2939, 72-2940, 72-2941, 72-2942.

ORDER

Filed: August 30, 1976.

Before: BROWNING and HUFSTEDLER, Circuit Judges, and SOLOMON,* District Judge.

The petition of defendants-appellants for rehearing is denied.

*Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

APPENDIX C.

Order Granting Stay of Issuance of Mandate.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. London Press, Inc., et al., Defendants-Appellants. Nos. 72-2938, 72-2939, 72-2940, 72-2941, 72-2942, DC #CR-8653-EAC.

ORDER STAYING
ISSUANCE OF MANDATE

Filed: September 13, 1976.

Upon application of Stanley Fleishman, Esq. counsel for the Appellants, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellants herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before September 29, 1976.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Shirley M. Hufstedler
Shirley M. Hufstedler
United States Circuit Judge.

Dated: San Francisco, Calif.

APPENDIX D.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."

2. The pertinent provisions of the Fifth Amendment are:

"No person shall . . . be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property, without due process of law . . ."

3. The provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

4. 18 U.S.C. §2 provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

5. 18 U.S.C. 371 provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

6. 18 U.S.C. 1461 provides in pertinent part:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

* * *

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made * * *

* * *

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be nonmailable, or knowingly causes

to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulation of disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

Supreme Court, U. S.
FILED
JAN 6 1977
MICHAEL RODAK, JR., CLERK

No. 76-445

In the Supreme Court of the United States

OCTOBER TERM, 1976

LONDON PRESS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1976. A petition for rehearing was denied on August 30, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on September 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on the facts of this case, petitioners were prejudiced because their obscenity convictions for acts committed and tried prior to *Miller* v. *California*, 413 U.S. 15, were based on the then prevailing national community standard.

2. Whether the government failed to prove scienter because petitioners' knowledge of the contents of the mailed material was stipulated but there was no other proof that petitioners knew the materials' "character and nature."

STATEMENT

After a jury-waived trial in the United States District Court for the Central District of California, petitioners, five corporations, were convicted on multiple counts of conspiring to mail obscene material, in violation of 18 U.S.C. 1461. Petitioner London Press, Inc., a printer, was also convicted as an aider and abetter on twenty-four substantive counts charging actual mailings. London Press was fined a total of $34,000 and costs, and the other petitioners were fined $10,000 and costs. The court of appeals affirmed (Pet. App. A).

The materials mailed included advertising brochures, a book entitled "Sexscope", and a magazine entitled "Foreplay" depicting nude males and nude females engaged in intercourse, fellatio and cunnilingus (Govt. Exs. 6-10, 13-31). The offenses and the trial took place prior to this Court's decision in *Miller* v. *California*, 413 U.S. 15. The district court applied the standard of obscenity defined in *Roth* v. *United States*, 354 U.S. 476, as modified by the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413.

Prior to trial the parties, with the approval of the court, stipulated (Govt. Ex. 32) that petitioners had knowledge of the contents of, and had agreed to mail the advertisements, books and magazines referred to in the various counts; and that various persons listed would be deemed to have testified as witnesses that they received the materials by mail (Pet. 5). In response to a request for a bill of particulars asking whether the government claimed that the materials exceeded community standards and appealed to the

prurient interest of the average person "in the nation as a whole," the government replied in the affirmative (Pet. 4-5). At trial expert witnesses for both the government and petitioners testified on the assumption that a national standard was at issue (Pet. 6) and the district court applied that standard in finding that seven items were obscene (Pet. 10-11).

Petitioners' appeal was decided subsequent to this Court's decisions in *Miller, supra,* and *Hamling* v. *United States,* 418 U.S. 87. After the court of appeals had considered supplemental briefs on the effect of these decisions (Pet. 13), the court issued a brief memorandum opinion holding, *inter alia,* that under its *en banc* decision in *United States* v. *Cutting,* 538 F. 2d 835 (C.A. 9), petition for a writ of certiorari pending, No. 76-10, the district court's reliance on national standards was harmless error (Pet. App. A).

ARGUMENT

1. Petitioners' contention that their convictions are invalid because the case was tried under a national standard is foreclosed by *Hamling* v. *United States,* 418 U.S. 87. In that case, as here, the trial occurred prior to *Miller*; consequently, a national standard was applied. This Court nevertheless affirmed the convictions, holding that there was no constitutional requirement that the obscenity of challenged materials be judged by the standards of a "precise geographic area" (418 U.S. at 105), that a pre-*Miller* conviction is invalid only if a defendant was "materially prejudiced" by trial under a national standard (*id.* at 107), and that there is no such prejudice unless "there is a probability that the excision of the references to the nation as a whole in the instruction dealing with the community standards would have materially affected the deliberations of the jury." *Id.* at 108. There was no such prejudice here, as shown by the court of appeals' *en banc*

decision in *United States* v. *Cutting, supra,* and the government's brief in opposition to the petition in that case at p. 8 (No. 76-10),[1] upon which we rely here.

The fact that trial here was by the court rather than by a jury does not place this case on a different footing from *Hamling* or *Cutting*. Just as a judge may substitute for a jury in cases in which the verdict must be determined on the basis of the propensities of a "reasonable" person, so too may he act in the same manner as a jury in determining the reactions of the average person, applying contemporary community standards. Contrary to petitioners' argument, nothing in the record indicates that the judge was unable so to act. Petitioners' assertions that he "specifically refused to draw on his own knowledge of the views of the average person in the community" and "implicitly stated that he did *not* know the limits of sexual candor and relied exclusively on the testimony of the experts in making his determination" (Pet. 16, emphasis in original) is not supported by the citations (Tr. 1447, 1529). The judge's remarks merely reflect the judge's realization that, like jurors, he could not decide the case on the basis of his own personal opinion of the material. See Pet. 10-11.

Indeed, as petitioners concede (Pet. 10), "[t]he trial judge made it clear that he was basing his opinion on the law and the evidence in the case as he understood it, and not on his personal views concerning the material." Thus, the "contemporary community standards" served its proper function in this case of insuring that the trier of fact apply an objective rather than a subjective standard. Although *Miller* rejected the view that the constitutional definition of obscenity be based on uniform national standards, the Court also ruled that no "precise geographic area is required

[1]We are serving copies of the brief in opposition upon counsel for petitioners in this case.

as a matter of constitutional law." *Hamling* v. *United States, supra,* 418 U.S. at 105. The critical element is that defendant be afforded an objective evaluation of the obscenity *vel non* of the material, and that was done in this case.

Furthermore, "the excision of the references to the 'nation as a whole' * * * would [not] have materially affected" (*id.* at 108) the outcome of the trial. "The purpose of the 'community standards' instruction is not to distinguish attitudes in one area from those in another, but rather to distinguish personal or aberrant views from the generalized view of the community at large." *United States* v. *Cutting, supra,* 538 F. 2d at 841.

Although the trier of fact "is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes" (*Hamling* v. *United States, supra,* 418 U.S. at 104) and as a result will apply the "local" attitudes because of the limited area from which the jury is drawn, this does not make the obscenity standard any more a geographic one than tests involving knowledge of the propensities of a reasonable person in other areas of the law.

The government here did not attempt to show that the national standard was stricter than the local community standard, nor did the trial court as trier of fact rely upon his personal attitudes towards the material in issue. Compare *United States* v. *Hensqn,* 513 F. 2d 156 (C.A. 9). Both parties correctly assumed that under the then-prevailing *Roth-Memoirs* test the national standard was the proper one. Neither petitioner nor the government attempted to show a different or less strict local standard.[2]

[2]Petitioners' reliance upon *United States* v. *Obscene Magazines, Film and Cards,* 541 F. 2d 810 (C.A. 9), is misplaced. There the Ninth Circuit simply held that the trial judge, as the trier of fact, properly found that the materials did not offend the community standards of the Los

Petitioners argue that the government's statement in its bill of particulars that the material was obscene under a national standard precluded them from demonstrating that it was not obscene under a more liberal local standard. But the statement merely set forth the government's theory of the case—in which petitioners apparently concurred—and did not prevent petitioners from offering evidence under a different theory.

2. Petitioners contend that the record does not establish scienter because they stipulated only knowledge of the contents of the materials, not knowledge of the materials' "character and nature." They rely upon this Court's statement in *Hamling, supra,* that "[i]t is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials". 418 U.S. at 123. But when these corporations stipulated knowledge of the contents of the advertisements, books and magazines involved in this case, they necessarily admitted knowledge of the character and nature of those materials. Compare *Smith* v. *California*, 361 U.S. 147, 152-153.

Petitioners' argument that the government failed to prove "guilty knowledge" (Pet. 27) in the face of their admission is simply a claim that the Constitution requires proof of a defendant's knowledge of the legal status of the materials. That contention is foreclosed by *Hamling*, 418 U.S. at 123. Moreover, no greater degree of "guilty knowledge" is required because petitioners were convicted of conspiring to violate 18 U.S.C. 1461, or, in the case of London Press, of aiding or abetting such a violation. Cf. *United States* v. *Feola*, 420 U.S. 671.

Angeles area notwithstanding the possibility that another factfinder could have reached the opposite conclusion. The possibility of divergent opinions as to the obscenity *vel non* of sexually explicit material exists in every obscenity prosecution.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1977.